Filed 6/25/19 P. v. Martinez CA1/4

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>RAFAEL MARTINEZ,<br>Defendant and Appellant. | A154180<br><br>(Humboldt County<br>Super. Ct. No. CR1704699) |

Rafael Martinez was convicted by a jury of committing a felony by carrying a concealed dirk or dagger. (Pen. Code § 21310.)[1] The jury also convicted Martinez of two misdemeanors: possessing burglary tools (§ 466); and possessing drug paraphernalia (Health & Saf. Code, § 11364). After finding that Martinez suffered a prior "strike" conviction under the Three Strikes Law (§ 667, subd. (b)–(i)), the trial court imposed an aggregate sentence of six years in prison and ordered Martinez to pay restitution fines and other court assessments.

Martinez requests that this court reverse his convictions for carrying a concealed dirk or dagger and possessing burglary tools, arguing multiple theories of trial court error. Alternatively, Martinez requests a reduction of his prison sentence, arguing the trial court erroneously denied his motion to dismiss his prior strike conviction. Finally, Martinez requests that we vacate an order requiring him to pay court assessments because the trial

[1] Statutory references are to the Penal Code unless otherwise indicated.

court did not find he had the present ability to pay them. We deny these requests and affirm the judgment and sentence.

## I. FACTUAL BACKGROUND

On the afternoon of November 16, 2017, Arcata Police Officer Tim Jaegel was on patrol in a marked police car when he saw Martinez walking near a shopping center. Jaegel was familiar with Martinez, knew he was on probation and subject to a warrantless search condition, and decided to detain him. After using his vehicle lights to stop Martinez, Jaegel got out of his car and went to talk.

Martinez was wearing jeans and a large black zippered jacket over a white t-shirt. The jacket was made of a heavy material and was baggy on Martinez, covering him midway down his thighs. As he talked to the officer, Martinez made gestures with his hands, which caused his jacket to come open, revealing the "tip of a blue handle." Jaegel recognized the object as a knife and removed it from inside Martinez's jacket and placed in on the roof of his patrol car. Jaegel did not take the knife when he first made contact with Martinez because he could not see it until Martinez's jacket came open. It looked to Jaegel like the knife could be used as a stabbing device and that it could inflict a grave wound. According to Jaegel, "the handle of the knife was approximately two to three inches in length, had a neon blue handle and the blade . . . had a sharp tip and it was about two to three inches in length, as well. It was what you'd think of a filet knife or something to cut fish or something like that."

Before completing a search of Martinez's person, Jaegel asked whether he was carrying a needle. Martinez admitted he was and stated that he was carrying drug paraphernalia in a glasses case. Inside the glasses case, Jaegel found a spoon with a burn mark on it, cotton, a glass methamphetamine pipe with residue on it, and a syringe needle with fluid inside, which Jaegel suspected was heroin. While searching Martinez, Jaegel also found approximately 12 "master keys" that were divided into multiple sets. Most of the keys were in the same jacket pocket where Jaegel found the knife, but some were in his back pocket. The keys were shaved down in ways that indicated they were burglary

tools. Most of the keys were for vehicles, but one was a skeleton key that could be used to open a variety of locks, and some keys appeared to be for opening a safe or lock.

The items Jaegel took from Martinez were admitted into evidence at Martinez's jury trial, except for the needle containing suspected heroin. Consistent with department policy, Jaegel did not book the needle into evidence because of safety concerns about people getting poked with it. At trial, the court also admitted excerpts of video from two cameras, one that was fixed to the windshield of Jaegel's patrol car and the other that was attached to Jaegel's chest. Jaegel's body camera did not begin recording until after he removed the knife from Martinez. However, the patrol car video captured Martinez walking down the street when Jaegel first noticed him. That video, which was played for the jury, showed Martinez pulling his jacket closed so that his shirt was no longer visible.

While testifying for the prosecution, Officer Jaegel identified the knife he took from Martinez, removed it from its sheath and displayed it for the jury to see. Under cross-examination, Jaegel testified that when he took the knife from Martinez's jacket pocket it was inside its sheath. Jaegel also acknowledged that the knife and sheath were part of a set, and that he used two hands to remove the knife from its sheath.

## II. DISCUSSION

### A. Martinez's Conviction for Carrying a Concealed Dirk or Dagger

Martinez appeals his conviction for violating section 21310, which provides that, subject to exceptions not applicable here, "any person in this state who carries concealed upon the person any dirk or dagger is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170."

The term "dirk or dagger" is defined in section 16470 as "a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. A nonlocking folding knife, a folding knife that is not prohibited by Section 21510 [pertaining to switchblades], or a pocketknife is capable of ready use as a stabbing weapon that may inflict great bodily injury or death only if the blade of the knife is exposed and locked into position." The Penal Code

further provides that "[a] knife carried in a sheath that is worn openly suspended from the waist of the wearer is not concealed within the meaning of" section 21310. (§ 20200.)

Thus, section 21310 "generally proscribes the concealed carrying of a knife, but provides exceptions for (1) a knife placed in a sheath and visibly suspended from the waist and (2) a nonswitchblade folding or pocketknife if the blade is not exposed and locked." (*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1371 (*Mitchell*).) "The Legislature's purpose in enacting the statute was to combat the dangers arising from the concealment of weapons" and to "give third parties the opportunity to protect themselves from the risk of a surprise attack by a person carrying a weapon." (*Ibid,* italics omitted.) In light of this purpose, "openly displayed sheathed" knives are excepted because such knives are visible. (*Id*. at pp. 1371–1372.) "Similarly, the folding or pocketknife exception is consistent with the statute's objective because folded knives are not capable of ready use 'without a number of intervening machinations that give the intended victim time to anticipate and/or prevent an attack.' " (*Ibid*.)

**1. Sufficiency of the Evidence**

Martinez contends the trial evidence does not support his conviction for violating section 21310 because the knife that was found inside his jacket did not constitute a dirk or dagger under section 16470.

The jury's finding that Martinez's knife fit the statutory definition of a dirk or dagger is subject to review under the substantial evidence test, which requires "evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

We conclude there is substantial evidence that the knife Martinez concealed on his person constituted a dirk or dagger under the statute. Its two- or three-inch blade had a sharp tip and was fixed to a handle. Upon removal from the sheath, it could be used to inflict great bodily injury or death. Though Martinez carried it in a sheath, the knife was

not openly suspended from his waist. It was concealed inside a pocket of his large jacket, where it was accessible to him but could not be seen by people he encountered.

Resisting this conclusion, Martinez argues his knife was not a dirk or dagger as a matter of law because undisputed evidence proves it was not capable of ready use. Specifically, Martinez relies on evidence that his knife was in a sheath and that Officer Jaegel used two hands to remove it from that sheath. We find no basis for concluding that the time required to remove a knife from a sheath means, without more, that the knife is not readily useable as a dangerous stabbing weapon. The Legislature implicitly found that sheathed knives are capable of ready use as a dangerous stabbing weapon by enacting section 20200, which excludes sheathed knives from the scope of section 21310 only if they are "openly suspended from the waist of the wearer." Thus, the fact that Martinez's knife was held in a sheath does not necessarily mean that it was incapable of ready use as a dangerous stabbing weapon.

Martinez points out that section 16470 creates an exception for a pocketknife unless the blade is exposed and locked into position. He argues that his sheathed knife falls within this exception because it was like a pocketknife in the sense that it was not readily accessible. Martinez relies on two cases to support this argument: *People v. Sisneros* (1997) 57 Cal.App.4th 1454 (*Sisneros*) and *In re Luke W.* (2001) 88 Cal.App.4th 650 (*Luke W.*). These cases involved former Penal Code provisions prohibiting possession of a concealed dirk or dagger. Nevertheless, they are relevant to elucidate the "capable of ready use" requirement in section 16470.

In *Sisneros,* the defendant was stopped by police for riding a bicycle at night that was not equipped with adequate lighting. (*Sisneros, supra*, 57 Cal.App.4th at p. 1455.) After noticing a knife in a sheath on the defendant's belt, the officers conducted a patdown search and found a "cylindrical device" that was approximately four and a half inches long and one-half inch in diameter. When unscrewed, the device "expose[d] a blade," which could be fashioned into a knife by turning it around and screwing it into the cylinder. (*Ibid.*) A jury convicted the defendant of violating former section 12020 by carrying a dirk or dagger concealed on the person, but his conviction was reversed on

appeal. The *Sisneros* court found that the defendant's device was not a prohibited dirk or dagger because it was not "capable of ready use as a stabbing weapon." (*Id*. at p. 1457.) Rather, the evidence showed that it had to be unscrewed a full five revolutions to expose a blade and then the blade had to be screwed five more revolutions to attach it to the handle. During the several seconds it took to "convert the gizmo from a benign cylinder into an instrument of death," it was "useless as a stabbing weapon" because the blade could not realistically be used unless it was attached to the handle. (*Ibid*.)

In *Luke W.*, the juvenile court sustained allegations that a ward violated former section 12020 by possessing a concealed dirk or dagger. (*Luke W., supra,* 88 Cal.App.4th at p. 652.) The object that was removed from the minor's pocket was the approximate size and shape of an audiocassette tape. It was designed to look like a credit card; the words " 'VISA' " and " '007' " and " 'Tomorrow Never Dies' " appeared on the surface of the object. (*Id*. at p. 654.) It was designed to "function" similar to a "Swiss Army pocketknife," housing a variety of tools that were accessed in different ways, including a compass, magnifying glass, plastic tweezers, toothpick, can/bottle opener, screwdriver, and a knife. (*Id*. at p. 655.) To access the knife, a person would have to place the thumb and forefinger of one hand on corresponding ridged circles located on the right side of the two flat surfaces of the object and pull, while using the other hand to hold the left side of the object. Through this machination, the knife emerged as "a separate, unattached item," which could then be clicked into place in its "slot" on the object. (*Ibid*.)

On appeal, the *Luke W*. minor argued his object was excluded from the statutory definition of a dirk or dagger because it was a pocketknife. (*Luke W., supra,* 88 Cal.App.4th at pp. 652, 655.) The appellate court observed that former section 12020 had received frequent legislative attention during the previous decade due to concerns about its broad definition of a dirk or dagger. (*Id*. at p. 653.) A 1997 amendment limited this definition by providing that a nonlocking folding knife, a folding knife that is not a switchblade and a pocketknife are " ' "capable of ready use as a stabbing weapon that may inflict great bodily injury or death" if "the blade of the knife is exposed and locked into position." ' " (*Id*. at p. 654.) The court found that the apparent intent of the 1997

amendment was to "avoid criminalizing the carrying of knives that are not capable of ready use because they are carried in a closed, secured state." (*Id.* at p. 656.) Thus, the court concluded that a small knife that does not fold but is "obviously designed to be carried in a pocket in a closed state, and which cannot be used until there have been several intervening manipulations, comport[s] with the implied legislative intent that such knives do not fall within the definition of proscribed dirks or daggers but are a type of pocketknife excepted from the statutory proscription." (*Ibid.*) The *Luke W.* court went on to find that the minor's object fell within the pocketknife exception to the statutory definition of a dirk or dagger, emphasizing that the object containing the knife could easily fit in a pocket of any article of clothing, the knife blade could not be easily extracted from its slot without manual manipulation using both hands, and the object was not a switchblade. (*Id.* at pp. 656–657.)

Martinez contends that his knife is no different than the knives in *Sisneros* or *Luke W.* because the fact that it was secured in a sheath rendered it incapable of ready use. We disagree. *Sisnero*s and *Luke W.* both involved a unique object that could be turned into a weapon only through a series of precise movements to expose and attach a separate blade. (*Sisneros, supra*, 57 Cal.App.4th at p.1457; *Luke W., supra*, 88 Cal.App.4th at p. 655.) By contrast, Martinez's knife had a fixed blade and sharp tip that could inflict serious injury. Martinez's knife was not a gizmo that required assembly to be capable of use as a dangerous weapon. (Compare *Sisneros,* at p.1457.) Nor was it a novelty item that required several intervening manipulations before it could be used as a knife. (Compare *Luke W.*, at p. 656.) The sheath protected Martinez from injury while the knife was concealed in his pocket, but it did not prevent him from readily using the knife as a dangerous stabbing weapon.

**2. Equal Protection**

Martinez contends that if his sheathed knife fits the statutory definition of a dirk or dagger, then his conviction under section 21310 violates the equal protection clauses of the state and federal constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)

Martinez forfeited this claim because he did not make it in the trial court. (*People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14; *People v. Burgener* (2003) 29 Cal.4th 833, 860–861, fn. 3.) On appeal, he contends a trial court objection was not required to preserve a constitutional challenge based on a question of law. (Citing *In re Sheena K.* (2007) 40 Cal.4th 875, 885.) However, his challenge is not a question of law; it hinges on a factual question about the nature of his knife. Martinez also requests that this court exercise its inherent authority to decide a claim that was not properly preserved for review because the alleged error deprived him of his liberty. This circumstance does not distinguish Martinez from the general body of criminal defendants appealing their convictions who have been deprived of their liberty.

Taking a different tack, Martinez argues that his trial counsel's failure to make an equal protection objection constituted ineffective assistance of counsel. In light of this claim, we address the merits of Martinez's equal protection argument, keeping in mind the appellant's heavy burden of proving an ineffective assistance of counsel claim. "[T]he defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice. . . . When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." *(People v. Mai* (2013) 57 Cal.4th 986, 1009.)

"The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, ' "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." ' [Citation.] 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' " (*People v. Brown* (2012) 54 Cal.4th 314, 328, italics omitted.) "If the two groups are not similarly situated or are not being treated differently, then there can be no equal protection violation. However, if these threshold

requirements are met, a court must next ascertain whether the Legislature has a constitutionally sufficient reason to treat the groups differently. [Citation.] Unless the groups are defined by word or effect as members of a 'suspect class' (such as race, national origin, gender, or illegitimacy, to name a few) or the law affects a fundamental right, a law will be upheld as long as there is any ' " 'rational relationship between the disparity of treatment and some legitimate governmental purpose,' " ' even if the rational basis for that law was never articulated by—or even relied on by—the Legislature." (*People v. Castel* (2017) 12 Cal.App.5th 1321, 1326–1327.)

Martinez contends that people who carry sheathed knives are similarly situated to people who carry pocketknives for purposes of applying a law that punishes the concealment of knives that are readily accessible. He reasons that just as the blade of a pocketknife cannot be easily extracted because of its "snug fit," a sheath makes a knife difficult to extract. Martinez further contends there is no compelling reason or rational basis for distinguishing between these two types of knives because a sheathed knife is just as difficult to extract as a pocketknife and both provide third parties with time to prepare for a confrontation. There are several flaws in this theory.

Section 21310 proscribes the concealed carrying of a knife to protect people who come in contact with the knife carrier. The prohibition is designed to prevent surprise attacks, which can occur when a concealed knife is capable of ready use as a dangerous weapon. (*Mitchell, supra,* 209 Cal.App.4th at p. 1371.) Thus, the law targets weapons that are not just easy to access but easy to use on unsuspecting third parties. For purposes of this law, people who carry pocketknives are not similarly situated to people who conceal sheathed knives on their person. The time required to retrieve a closed pocketknife from inside one's clothing and then open its blade and lock it into place reduces the element of surprise, giving third parties the opportunity to protect themselves. By contrast, a knife that is sheathed will often be much easier to locate and the dexterity required to pull the knife from its sheath is materially different from the process of opening a blade from a pocketknife and locking it into place.

Moreover, because pocketknives are different from sheathed knives both in terms of appearance and utility, there is a rational basis for treating them differently. Under section 16470, for a pocketknife to be capable of ready use as a dangerous stabbing weapon, the blade must be open and locked into place. A knife with a fixed blade will always be open and locked into place, whether or not it is sheathed. In this sense, a sheath is like a handguard, which offers protection to the knife user without impeding its ready use as a dangerous weapon, and the Legislature has concluded that a knife with a fixed open blade qualifies as a dirk or dagger whether or not it is equipped with a handguard. (§ 21310.)

These flaws in Martinez's equal protection theory preclude him from carrying his burden of proving ineffective assistance of counsel. "Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387.) Because people who conceal sheathed knives on their person are not similarly situated to people who carry pocketknives and because there is a rational basis for different treatment of these two distinct groups, Martinez's trial counsel could have concluded reasonably that objecting to Martinez's conviction on equal protection grounds would have been futile.

**3. The Second Amendment**

Martinez contends that if his knife fits the statutory definition of a dirk or dagger then section 21310 violates the Second Amendment of the federal constitution because its restriction on his right to bear arms in self-defense is not narrowly tailored to a legitimate government objective. Again, this claim was forfeited because it was not raised below. Thus, we turn to Martinez's fallback position that the failure to make a Second Amendment challenge constituted ineffective assistance of counsel. Martinez argues that competent defense counsel would have argued that his conviction violates the Second Amendment under the reasoning of *Mitchell, supra,* 209 Cal.App.4th 1364.

In *Mitchell,* the defendant was detained for riding a trolley without a ticket. (*Mitchell, supra,* 209 Cal.App.4th at p. 1369.) When he leaned over while sitting on a bench, a security officer noticed the silver tip of an object that appeared to be a knife

sticking out below his sweatshirt. A pat down search revealed that defendant was wearing a knife between his belt and trousers that was covered up by the sweatshirt. He told the officer that he carried the knife for self-defense but later claimed that he had it with him because he was going fishing. (*Id*. at p. 1370.) A jury convicted defendant of violating former section 12020, and the court imposed a five year prison term due to a prior strike. On appeal, the *Mitchell* court rejected defendant's claim that former section 12020 violated the Second Amendment. Relying on authority rejecting Second Amendment challenges to statutes restricting the carrying of concealed firearms, the court found that former section 12020 was "narrowly tailored to serve the important governmental interest of preventing exposure to the risk of surprise attacks and [did] not burden the right to bear arms in self-defense beyond what [was] reasonably necessary to serve that interest." (*Id.* at p. 1375–1376.) In reaching this conclusion, the court reasoned as follows:

"[A]n instrument qualifies as a dirk or dagger only if it is a knife or other instrument capable of ready use as a stabbing weapon that may inflict great bodily injury or death; hence, the statute is narrowly restricted to concealed stabbing instruments that pose a serious threat to physical safety. Further, the statute does not apply to the open carrying of a dirk or dagger, and it excludes from its coverage an openly suspended sheathed knife, as well as nonswitchblade folding and pocketknives kept in a closed or unlocked position. Thus, the statute provides other means of carrying a dirk or dagger for self-defense." (*Mitchell*, *supra*, 209 Cal.App.4th at p. 1375.)

Martinez contends that *Mitchell* establishes that a restriction on the right to carry a knife for self-defense can be justified under the Second Amendment only if it is "capable of ready use," whereas he was convicted of possessing a weapon that was not capable of ready use because it was sheathed. As explained above, the factual premise of this claim is erroneous; the trial evidence did not compel the jury to find that Martinez's sheath prevented him from easily accessing and readily using his knife as a dangerous stabbing weapon. Furthermore, section 21030 provides means of carrying a dirk or dagger for

self-defense that do not pose the same serious threats to physical safety as a concealed stabbing instrument like the one removed from the inside pocket of Martinez's jacket.

In short, with *Mitchell* as the governing authority, defense counsel's failure to make a Second Amendment challenge in this case was not ineffective assistance of counsel. (See *Price, supra,* 1 Cal.4th at p. 387.)

**B. Prosecutor Misconduct**

Martinez contends his convictions for carrying a concealed dirk or dagger and possessing burglary tools must be reversed because the prosecutor committed prejudicial misconduct during his closing argument. " 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' " (*People v. Montes* (2014) 58 Cal.4th 809, 869.) Because Martinez identifies no deceptive or reprehensible method, we use federal due process criteria to evaluate his claim.

**1. Background**

During his closing argument, the prosecutor used the elements of the three charges against Martinez to frame his discussion of the trial evidence. While addressing the section 21310 charge, the prosecutor argued several circumstances established that Martinez knew the object he was carrying could be readily used as a stabbing weapon: it was a knife with a pointed edge; it was located between his chest and hip where he could get to it easily; and he was carrying it "in tandem, in combination, with burglar tools, with drug paraphernalia." This last circumstance became a theme of the prosecutor's closing; he argued that Martinez carried the knife so that he would be prepared for a dangerous encounter while committing car burglaries and engaging in drug-related activities. When he presented this theory to the jury, the following exchange occurred:

"[Prosecutor]: How Mr. Martinez makes his money in order to buy drugs is to break into vehicles to steal the property, then to sell it to get money to buy drugs. When

you are doing that, it's a dangerous prospect. Having a knife readily available to defend yourself against somebody potentially defending their property or whatever is, based on these circumstances, the way he was carrying these items together, is what was going on and it makes sense.

"[Defense Counsel]: Objection. Arguing facts not in evidence, your Honor.

"[The Court]: Overruled. [¶] Ladies and gentlemen, this is simply argument by counsel. I indicated to you before, what the attorneys say is not evidence. You've heard the evidence. You rely on what you understand the facts of this case to be. [¶] Thank you."

Defense counsel began his closing argument by urging the jury to give separate consideration to each charge, arguing there was no evidence to justify linking together the items taken from Martinez, as the prosecutor was attempting to do. Counsel argued that the prosecutor was using conjecture and speculation to "create[] a . . . negative picture" of Martinez that was not "backed by the evidence." In presenting this theory, counsel conceded Martinez had drug paraphernalia and suggested that the prosecution was using that fact to throw "the kitchen sink" at him.

Defense counsel also disputed the prosecutor's claim that Martinez intentionally concealed his knife, arguing that it would have been simple enough to hide, but that was not his client's intent: "My client is walking down the sidewalk eating a cinnamon roll and drinking a Yoo-hoo. He's not making an effort to conceal this knife." Defense counsel used these same circumstances to argue that there was no evidence that Martinez carried the keys with the requisite felonious intent: "[I]f the evidence was different and you had him in a dark, lit parking lot at night, lurking amongst cars or was found in somebody's side yard with a mask or something of that nature, maybe we get . . . a little more certainty. This is, again, having him walking down the sidewalk at 1:45 p.m. eating some food."

Defense counsel also argued that Martinez's knife was not an illegal dirk or dagger. He characterized the knife as a "very ordinary, small knife," a "small utility knife," the type of item that a "chef" or "fisherman" would have. He argued that the

prosecutor was adopting an "absurd" interpretation of section 20130 by claiming that Martinez's possession of such an everyday item was illegal.

During rebuttal, the prosecutor disputed the defense claim that Martinez was just taking a stroll with a muffin and drink when a police officer decided to harass him, arguing: "[Martinez] wasn't minding his own business. He was out to criminal activity at 1:45. That's why he had 12 different keys in his pocket. That's why he had a knife right here (indicating). That's why he had drug paraphernalia. He was up to all types of no good that day. Officer Jaegel, being proactive, prevented the future crime of car burglary from happening." Continuing with this theme, the prosecutor argued that the reason defense counsel did not offer the jury an innocuous reason for Martinez to have all those keys was because there was no legitimate use for them. At that point, defense counsel objected that the prosecutor was attempting to shift the burden, but the objection was overruled.

The prosecutor told the jury that Martinez was not a "horrible" person but, as a matter of common sense, there was an element of criminality, which was demonstrated by the "story" that is told by the combination of items that were found on Martinez: "It tells that he didn't have any dope on him, did he? He didn't have any drugs on him to use, did he? But you know what he had? A bunch of keys to use to get into vehicles, to use to get into houses so that he can steal property so that he can go to the other criminal and sell the property and get the money to buy the drugs to use with his paraphernalia. All of those things are dangerous, period."

The prosecutor characterized Martinez as a "burglar going to work." Like a carpenter who carries a saw, ladder and lumber, Martinez went to work "with his concealed knife, with his drugs and his burglary tools." The element of criminality to his behavior was best understood by making connections between the items he was carrying. Further, the video showed that Martinez was pulling his coat in a way that suggested he was trying to hide the knife, which was evidence of his consciousness of guilt. Thus, the prosecutor disputed defense counsel's argument that there were holes in the prosecution case: "What's this other story that we've kept out? Because [defense counsel] didn't

give you a story. I displayed all of the evidence. I put the officer on. I played the video footage. I did everything that the People can do. I gave you everything."

**2. Referring to Facts Not In Evidence**

Martinez contends the prosecutor committed misconduct by repeatedly telling the jury that Martinez broke into cars, stole things so he could buy drugs, and carried the knife so that he would be better "prepared" to engage in this dangerous activity. Martinez maintains there was no evidence that he used the knife to commit violent burglaries and thus the prosecutor's argument was nothing more than an improper appeal to the fears and passions of the jury.

The People contend most of this claim was forfeited because defense counsel only objected to one isolated remark at the beginning of the prosecutor's closing argument. "[T]o preserve an appellate claim of prosecutorial misconduct, a defendant must make a timely objection at trial and request an admonition; otherwise, a claim is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Wilson* (2005) 36 Cal.4th 309, 337 (*Wilson*).) Here, the defense lodged an early objection that the prosecutor was relying on facts not in evidence, which the trial court overruled. This objection preserved the issue for review.

A prosecutor commits misconduct by misstating material facts or relying on facts that are not in evidence. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 95.) Referring to facts not in evidence constitutes misconduct when the prosecutor has essentially acted as his own witness by "offering unsworn testimony not subject to cross-examination." (*People v. Hill* (1998) 17 Cal.4th 800, 828.) However, "[c]ounsel may argue facts not in evidence that are common knowledge or drawn from common experiences." (*People v. Young* (2005) 34 Cal.4th 1149, 1197.) Moreover, prosecutors have wide latitude to comment on the state of the evidence and to draw reasonable inferences or deductions. (*People v. Martinez* (2010) 47 Cal.4th 911, 957.) " 'Whether the inferences the prosecutor draws are reasonable is for the jury to decide.' " (*Wilson, supra,* 36 Cal.4th at p. 337.)

Here, the prosecutor did not attempt to prove his case by attesting to facts that were not in evidence before the jury. Instead, he asked the jury to draw inferences from the trial evidence, which included the three sets of objects found on Martinez's person. The argument that these items were carried together for a reason "did not mischaracterize the evidence or assume facts not in evidence, but merely commented on the evidence and made permissible inferences." (*People v. Valdez* (2004) 32 Cal.4th 73, 134.)

Furthermore, as noted in our background summary, when the trial court overruled the defense objection that the prosecutor was referring to facts not in evidence, it reminded the jury that statements by attorneys are not evidence and it was up to them to determine the facts from the evidence presented. Thus, "[e]ven if we were to assume there was some impropriety in the prosecutor's argument, it was cured when the trial court instructed the jury with the standard admonition that argument is not evidence." (*People v. Cash* (2002) 28 Cal.4th 703, 734.)

**3. Commenting on the Defendant's Silence**

Martinez contends that the prosecutor committed misconduct during rebuttal by arguing that defense counsel did not provide the jury with an explanation for why Martinez possessed the keys or an alternative "story" explaining the items found in his pocket. According to Martinez, these arguments violated *Griffin v. California* (1965) 380 U.S. 609, 615 (*Griffin*) because they drew the jury's attention to the fact that he had exercised his Fifth Amendment right not to testify.

The People contend that Martinez forfeited this claim because the objection made by defense counsel was that the prosecutor was attempting to shift the burden of proof, not that he violated *Griffin.* Martinez rejoins that if his trial counsel's objection was inadequate, he was denied the effective assistance of counsel.

*Griffin* holds that the Fifth and Fourteenth Amendments to the United States Constitution "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (*Griffin, supra,* 380 U.S. at p. 615.) Applying this rule, our Supreme Court has clarified that " '[a]lthough a prosecutor is forbidden to comment " 'either directly or indirectly, on the

defendant's failure to testify in his defense,' " the prosecutor may comment " 'on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses.' " ' " (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1333.) Here, the prosecutor did not directly or indirectly remark on the fact that Martinez did not testify at trial. His argument that there was no other explanation for the master keys and no other "story" explaining the items recovered from Martinez was a comment about the state of the evidence.

Martinez relies on *People v. Williams* (1971) 22 Cal.App.3d 34 (*Williams*), where the prosecutor violated *Griffin* by telling the jury that the defendant was the only person who could explain why he committed the charged murder. This error was compounded by an erroneous jury instruction, which allowed the jury to draw an inference from defendant's silence. (*Id*. at pp. 43–44.) Martinez contends this case is similar to *Williams* because he was the only person who could provide an explanation for his possession of the keys. We disagree. The *Williams* prosecutor questioned the defendant's subjective motive whereas here the prosecutor did not argue or suggest that Martinez was the only person who could explain the keys but rather that there was only one reasonable explanation for that evidence. Moreover, in contrast to *Williams*, there was no erroneous instruction that could have led the jury to misconstrue the prosecutor's argument.

In *People v. Stewart* (2004) 33 Cal.4th 425, the Supreme Court found that a prosecutor made permissible arguments by commenting on the "failure of defense counsel—not defendant—to provide to the jury a reasonable explanation consistent with defendant's innocence." (*Id*. at p. 506.) Here, the prosecutor made essentially the same argument by pointing out that defense counsel could not provide a legitimate reason for Martinez to be carrying the keys. Thus, there was no *Griffin* error.

The decision whether to object during opposing counsel's arguments in a criminal trial " 'is inherently tactical, and the failure to object will rarely establish ineffective assistance.' " (*People v. Lopez* (2008) 42 Cal.4th 960, 972.) Because competent counsel may often elect to forego even a valid objection, the tactical decision whether to object is

"not ordinarily reviewable on appeal.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1197.) Here, defense counsel could have concluded reasonably that a *Griffin* objection would have been futile. Thus, his trial counsel's failure to object did not constitute ineffective assistance of counsel.

**C. Sentencing Issues**

Martinez challenges two rulings made by the trial court at Martinez's sentencing hearing. First, the court denied a defense motion to strike Martinez's prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Second, the court imposed fines without making a finding that Martinez had the ability to pay them.

**1. Background**

After the jury returned its verdicts, the court held a bifurcated trial regarding the allegation that Martinez had a prior felony conviction qualifying as a strike under the Three Strikes Law. The prosecution's evidence included a certified copy of a "rap sheet" and an abstract of judgment, which showed that on May 30, 1996, Martinez was convicted of robbery (§ 211). The trial court found that Martinez suffered this conviction and that it qualified as a strike (§ 667, subd. (b)–(i)).

Prior to sentencing, the defense filed a *Romero* motion to dismiss the prior strike conviction. (§ 1385.) Martinez argued that this prior conviction did not justify enhancing his sentence because he was only 18 when he committed the robbery, no weapon was involved, and he was heavily intoxicated at the time. He argued further that he developed a drug addiction while he was in prison, which had ongoing negative consequences including a relapse prior to the commission of his current offenses. Martinez proposed that a drug treatment program was the appropriate sentence in light of his non-violent history and the fact that it had been more than 20 years since he acquired the prior strike conviction.

At the sentencing hearing, the parties argued the *Romero* motion and then submitted the matter. The court denied the motion, explaining that two facts were particularly relevant: Martinez failed to perform well on parole, suffering three prior

violations; and after Martinez received drug treatment, he suffered a 2011 conviction for illegal weapon possession and was sentenced to another prison term. The court also emphasized that after Martinez committed the strike he did not lead a crime-free life, and that his conviction for possessing illegal weapons showed "a tendency toward violence."

Then the court heard arguments regarding sentencing matters. The probation department recommended that the court impose an upper term of three years for the section 21310 conviction, which would be doubled to six years due to the strike. The prosecutor agreed, arguing there were no mitigating circumstances. The defense argued that a six-year sentence was excessive. The trial court found that Martinez's addiction was a mitigating factor, but it was outweighed by aggravating factors reported by probation, which included a history of violence, numerous prior convictions, prior prison terms, and unsatisfactory performance on probation/parole.

Thus, the court imposed an upper term of three years for the section 21310 conviction, which was doubled to six years for the strike prior. The court also ordered Martinez to pay the following fines and fees: (1) a restitution fine of $1,800 imposed pursuant to section 1202.4, subd. (b); (2) a parole revocation restitution fine of $1,800 imposed pursuant to section 1202.45, which was suspended; (3) a $196.33 "booking" fee, imposed under Government Code section 29550.2; (4) a $40 court security fee for each of the three convictions, imposed under section 1465.8 subd. (a)(1); and (5) a $30 conviction assessment for each conviction, imposed under Government Code section 70373.

**2. The *Romero* Motion**

In furtherance of justice, a trial court may strike or vacate a finding under the Three Strikes law that the defendant has previously been convicted of a serious or violent felony. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th 529–530.) When this issue arises, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously

been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

We review the trial court's ruling on a *Romero* motion under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) The trial court "does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) " '[W]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.' " (*Id.* at p. 378.)

Martinez contends the trial court abused its discretion here by treating Martinez's recidivism as dispositive and failing to consider mitigating circumstances that the prior strike was committed when he was only 18 and did not involve violence. The record shows that the trial court did consider these factors but concluded they were not determinative. Martinez also contends his prospect for rehabilitation was demonstrated by evidence he has held jobs in the past and that he was willing to participate in drug treatment. This argument ignores countervailing evidence, including that Martinez repeatedly violated parole, was convicted of a weapons offense after his robbery strike, and received drug treatment prior to his commission of the current offenses.

Martinez argues he does not fall within the "newly defined spirit of the Three Strikes Law," after it was amended in 2012 to reflect the passage of Proposition 36. Acknowledging that Proposition 36 dealt specifically with third strike offenses, Martinez argues that it also redefined the general spirit of the Three Strikes Law by shifting its focus to ensuring that the punishment fits the crime and to making room in prison for dangerous felons. Martinez posits that enhancing his sentence violates this spirit because his prior and current offenses were non-violent and a six-year sentence for possessing a sheathed fishing knife is "patently absurd."

Proposition 36 did not change the express purpose of the Three Strikes law, which is to "ensure longer prison sentences and greater punishment of those who commit a felony and have been previously convicted of one or more serious or violent felony

offenses." (§ 667.) The determination whether a sentence is consistent with the spirit of this law is not as limited as Martinez contends, but requires consideration of the nature and circumstances of the current felony and prior offenses, as well as the defendant's personal background, character and prospects. (*Williams, supra,* 17 Cal.4th at p. 161.) Factors that have been found to indicate a defendant falls within the spirit of the Three Strikes law are a crime's potential for great bodily harm, the number and seriousness of a defendant's prior convictions, poor previous performance on probation (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 475-476; *People v. Strong* (2001) 87 Cal.App.4th 328, 344; *People v; Philpot* (2004) 122 Cal.App.4th 893, 907), additional crimes intervening between the strike offense and the current offense, and multiple convictions for similar behavior (*Williams, supra,* 17 Cal.4th at p. 163).

Several of these relevant factors support the trial court's ruling in this case. Moreover, contrary to Martinez's argument here, his propensity toward violence is one such factor. Martinez's prior robbery conviction was a serious or violent felony. After suffering that strike, Martinez was convicted of another felony involving a weapon. Furthermore, although his current offenses did not involve violence, Martinez concealed a knife on his person that was capable of ready use as a dangerous stabbing weapon.

We hope that Martinez is correct that he is a good candidate for rehabilitation, and that he will prove this with his conduct once he is released. But we cannot say that this is an extraordinary case in which no reasonable person could find defendant falls within the spirit of the Three Strikes law. (See *Carmony, supra,* 33 Cal.4th at p. 378.) The trial court acted within its discretion in denying Martinez's *Romero* motion.

**3. Fees and Fines**

Finally, Martinez contends the trial court erred by requiring him to pay $40 court security fees and $30 conviction assessments for each of his convictions without finding that he has the ability to pay them. As support for this claim, Martinez relies on *People v. Duenas* (2018) 30 Cal.App.5th 1157 (*Duenas*), which was decided after Martinez was sentenced and filed the present appeal.

The *Duenas* defendant was convicted of driving on a suspended license and sentenced to probation. (*Duenas, supra,* 30 Cal.App.5th 1157.) At her sentencing hearing she objected that she did not have the ability to pay statutory fees and fines, requested a hearing on the matter and produced undisputed evidence establishing her inability to pay. (*Id*. at p. 1162.) Consequently, the court struck some fees, but imposed others that it concluded were mandatory. (*Id*. at pp. 1162–1163.) On appeal, the *Duenas* court found it was a violation of constitutional due process to impose court assessments required by section 1465.8 and Government Code section 70373, neither of which was intended to be punitive, without finding that the defendant had the ability to pay them. (*Id*. at p. 1168.) The court also found that, although a restitution fine imposed under section 1202.4 was considered additional punishment for defendant's crime, that fine posed constitutional concerns because the trial court was precluded from considering ability to pay when imposing the minimum fine authorized by the statute. To avoid the constitutional problem, the court held that section 1202.4 requires a trial court to impose a minimum fine regardless of ability to pay, but that execution of the fine must be stayed until the defendant's ability to pay is determined. (*Id*. at p. 1172.)

In this case, the trial court imposed the same court assessments that were imposed in *Duenas* in addition to three more substantial fines. Unlike the *Duenas* defendant, Martinez did not request a hearing regarding his ability to pay any fines or object to them on *any* factual or legal ground. Thus, he forfeited his claim that fines should not have been imposed on him. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864 [appellate forfeiture rule applies to probation fines and attorney fees imposed at sentencing]; *People v. McCullough* (2013) 56 Cal.4th 589, 596–597 [defendant forfeits appellate challenge to the sufficiency of evidence supporting a Government Code section 29550.2, subdivision (a) booking fee if objection not made in the trial court]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [appellant forfeiture rule applies to defendant's claim that restitution fine amounted to an unauthorized sentence based on his inability to pay]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [claim that trial court erroneously failed to consider ability to pay a restitution fine forfeited by the failure to object].)

Martinez argues his challenge is not forfeited because it raises a pure question of law. We disagree; this due process challenge to Martinez's sentence is premised on an alleged inability to pay, which is a factual issue that was not raised in the trial court. Alternatively, Martinez argues that a due process objection to his fines would have been futile because at the time of his sentencing hearing he did not have the benefit of the *Duenas* decision. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 488–489; but see *People. v Frandsen* (2019*)* 33 Cal.App.5th 1126, 1154–1155 [positing that *Duenas* was based on settled principles of due process].) However, the fact that *Duenas* announced a new rule is beside the point of this case. Forfeiture did not result from Martinez's failure to make a due process objection but rather from his failure to request a hearing or to otherwise dispute his ability to pay any of the fines.

In contrast to *Duenas*, in this case Martinez's ability to pay was a statutory consideration with respect to the most significant fine imposed on him, the $1,800 restitution fine imposed under section 1202.4. Section 1202.4, subdivision (d) outlines factors for the court to consider when setting the amount of a restitution fine above the statutory minimum, which include the defendant's "inability to pay." Here, the probation department recommended a restitution fine that exceeded the $300 statutory minimum by more than $1,000, a recommendation that the trial court adopted without objection. If Martinez believed he was unable to pay restitution, it was incumbent on him to object at sentencing and request an ability-to-pay hearing, and the failure to do so resulted in a forfeiture of the claim for purposes of appellate review. (*People v. Nelson, supra*, 51 Cal.4th at p. 227.)

Martinez cannot avoid the consequences of his failure to request an ability-to-pay hearing by limiting his appellate challenge to the specific assessments imposed under section 1465.8 and Government Code section 70373. Unlike the *Duenas* defendant, Martinez had a statutory right to an ability-to-pay hearing that he did not exercise, thus forfeiting his appellate claim that such a hearing was required. After all, the same evidence in the same hearing that would have addressed Martinez's ability to pay an

$1,800 restitution fine, could have also established his inability to pay these smaller assessments, had Martinez chosen to litigate this issue.

## IV. DISPOSITION

The judgment is affirmed.

_____
TUCHER, J.

WE CONCUR:

_____
POLLAK, P. J.

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BROWN, J.